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Fundamental what?
The difficult relationship between Foreign Policy and Fundamental rights

© Dr Eleanor Spaventa¹

[In M. Cremona and B. de Witte (eds.), *EU Foreign Relations law: Constitutional Fundamentals* (Oxford, Hart Publishing, forthcoming 2007)]

In the past years we have witnessed an increased activity in the field of EU foreign policy. In particular, following the terrorist attacks in the United States first, and in Europe later, the Union has adopted a series of measures which directly affect individuals. In some instances, those measures were aimed at implementing Security Council resolutions which imposed sanctions on named individuals and / or alleged terrorist organisations; in other cases, following the general Security Council Resolution on terrorism,² the EU adopted its own measures. The ‘fight against terror’ has also led to an increased activity in the field of co-operation in the criminal sphere, and most notably in the adoption of the framework decision on terrorism and the framework decision on the arrest warrant.³

The increased activity in fields which affect individual rights raises important problems in relation to fundamental rights protection. In this respect, the EU shows a considerable degree of schizophrenia: on the one hand, it seeks to reassure its citizens, as well as its international partners, as to its sincere commitment to fundamental rights through the adoption of the Charter,⁴ its action in the field of discrimination,⁵ the creation of the fundamental rights agency,⁶ as well as the considerable improvements that would have been introduced by the Constitutional Treaty.⁷ On the other hand, the fundamental rights agency lacks powers in relation to co-operation in criminal matters and common and foreign security policy, the areas in which fundamental rights scrutiny would have been

¹¹ Department of Law, Durham University, and Durham European Law Institute. I am grateful to Marise Cremona and Bruno de Witte for organising a very stimulating workshop and for their comments on an earlier version of this paper. I am also grateful to the other participants for a very lively and interesting discussion on these issues, and to Andrés Delgado Casteleiro for having very kindly brought to my attention the Spanish Supreme Court’s ruling in the SEGI case. The usual disclaimer applies.

² UN Security Council Resolution 1373(2001).

³ Council Framework Decision on Combating Terrorism 2002/475/JHA, [2002] OJ L164/3, and Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedure between Member States, [2002] OJ L190/1. The latter measure has been the focus of much controversy with national courts clearly not being all that confident that it is consistent with fundamental rights. A preliminary reference is currently pending in front of the ECJ on the compatibility of the framework decision with Article 6 ECHR, see Case C-303/05 *Advocaten voor de wereld v Council* (Referred by the Belgian Court of Arbitration), Opinion delivered 12/09/06. See also the ruling by the German Constitutional Court, *Bundesverfassungsgericht*, 18/7/05, 2 BvR 2236/04.

⁴ [2000] OJ C 364/1, and amended version in Part II of the Constitutional Treaty (2004 OJ C 310/1).

⁵ Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial and ethnic origin, [2000] OJ L 180/22; Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16.

⁶ Regulation 168/2007 establishing a European Agency for Fundamental Rights [2007] OJ 53/2.

⁷ E.g. the CT would have made the Charter legally binding; and would have extended the jurisdiction of the Court to the third pillar, as well as to CFSP action when such action affected individuals.

most needed and useful,⁸ and, generally speaking, the Union seems incapable to ensure even that minimum standard of protection required (from the Member States) by the European Convention on Human Rights. Nor should one consider this schizophrenia as simply the result of an inherent pathological condition stemming from the European Union's institutional and constitutional structure. After all, whilst it is true that the second and third pillars are ill equipped to afford even a minimum level of democratic and judicial accountability, it is also true that action at Union level was not essential, and the Member States could have well refrained from using Union instruments until that moment in which a more healthy institutional structure had been put into place. And even should one consider that co-ordinated Member States' action would have not been sufficient and that therefore Union activity in these fields was an absolute necessity, it should be noted that there are instances, some of which will be examined in detail below, where the Union and (some) Member States could have chosen a different path to reach the same result, whilst being more respectful of both their citizens and their own constitutional obligations.

In this contribution I will analyse some of these problems. In particular, after having given a brief account of the Union's institutional structure, I will analyse, from a fundamental rights perspective, the problems arising from the adoption of 'terrorist lists'. In this respect it is necessary to distinguish between the *Taliban* list,⁹ which is of UN derivation and which does not leave any discretion to the EU as to whom should be included in the list, and the EU's own list.¹⁰ The latter is further divided in two types of listing: foreign-linked alleged terrorists, and those alleged terrorists who do not have any link with outside the EU.¹¹ My overall conclusion is that we are witnessing a progressive erosion of the very guarantees that were at the foundation of post-war nation states, a result which is perhaps inevitable once concepts which are inherently political, and to a certain extent subjective, such as the definition of terrorism,¹² are transformed into objective and unquestionable legal 'truths' via the medium of international executive action.

⁸ In this respect, see the statement by the Italian Government concerning the Regulation establishing a European Agency for Fundamental Rights, Annex 6166/07, available on statewatch.org; www.statewatch.org/news/2007/feb/eu-hra-6166-07.pdf.

⁹ Common Position 2002/402/CFSP concerning restrictive measures against Usama bin Laden, members of the Al-Qaeda organization and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP, (2002) OJ L 169/4 (Hereinafter Common Position 2002/402, or the Anti-Taliban Common Position). The assets of those identified at UN level are frozen pursuant to Council Regulation 88/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban (...) (2002) OJ L 139/9, as updated regularly (hereinafter Council Regulation 88/2002, or the Anti-Taliban Regulation).

¹⁰ Council Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (2001) OJ L 344/93, as updated regularly (hereinafter Common Position 2001/931 or the EU list).

¹¹ For sake of convenience I will refer to alleged terrorists and terrorists organisations simply as 'terrorists'; I will also refer to 'foreign linked' terrorists, as 'foreign terrorists', even though their status has nothing to do with nationality. And I will refer to those who have no link with outside the EU as 'home-terrorist'.

¹² It is not by coincidence that the UN could not reach an agreement on the definition of 'terrorism' in its anti-terrorism Resolution ((1373)2001).

I THE EUROPEAN UNION'S INSTITUTIONAL STRUCTURE AND FUNDAMENTAL RIGHTS

Action in the field of Common and Foreign Security Policy is pursued through joint actions and common positions, whilst the general agenda is set through general guidelines and common strategies. Joint actions address specific situations and 'commit the Member States in the positions they adopt and in the conduct of their activity'.¹³ Common positions, on the other hand, define the approach of the Union to 'a particular matter of a geographical or thematic nature'.¹⁴ Unanimity is required for both instruments, although qualified majority is sufficient when the instrument is adopted on the basis of a common strategy. In any event, however, if a Member State opposes Union action for reasons of national policy then the instrument can be adopted only following a unanimous vote.¹⁵ The role of the European Parliament is limited to the right to be consulted by the Presidency on the main aspects and basic choices concerning the CFSP. The Presidency must then ensure that Parliament's views are taken into due consideration; and Parliament must be 'regularly informed' in relation to the Union's foreign policy.¹⁶

The Union can also adopt international agreements in relation to both Common and Foreign Security Policy and in relation to fields falling within the scope of police and judicial co-operation in criminal matters (Title VI). In relation to those agreements Article 24(5) TEU provides that 'no agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure', even though the other Member States might decide that the agreement shall nonetheless apply provisionally. The 'constitutional safeguard' suggests that the agreement concluded by the Union is binding upon the Member States, unless they have made the declaration.

The jurisdiction of the European Court of Justice is excluded in relation to second pillar instruments, which, in any case, cannot have direct effect unless the Community takes action by using the 'passarelle clause' provided in Articles 60 EC read together with Article 301 EC. The latter states that when it is provided in a CFSP common position or joint action that the Community should take action to 'interrupt or reduce, in part or completely, economic relations with one or more third countries', the Council must take the necessary measures. And Article 60 empowers the Community to take the 'necessary urgent measures on the movement of capital and payments as regards the third countries concerned'. Moreover, the Court of First Instance has clarified that Article 60 EC and 301 EC can be read together with Article 308 EC, in order to establish competence to adopt measures for the freezing of assets even when there is no direct connection with a third 'state'. This is the case despite the fact that Article 60 EC provides for the

¹³ Article 14 TEU.

¹⁴ Article 15 TEU.

¹⁵ Article 23 TEU.

¹⁶ Article 21 TEU.

competence to adopt urgent measures in the field of the free movement of capital in relation to 'third countries'.¹⁷

In relation to action in the field of police and judicial co-operation in criminal matters, the two main instruments that can be used are common positions and framework decisions. The former define the approach of the Union to a particular matter, whilst the latter are akin to directives in the first pillar, but for the explicit exclusion of the possibility of direct effect.¹⁸ Common positions are adopted by the Council without consultation with the European Parliament, and the European Court of Justice does not have any jurisdiction (but for the possibility of policing whether the act should have been adopted at Community level).¹⁹ Framework decisions are adopted after consultation with the European Parliament and there is limited jurisdiction of the European Court of Justice. In particular, the Court's jurisdiction is voluntary, i.e. dependant upon an explicit declaration by the Member State,²⁰ and is excluded in relation to the review of proportionality of operations carried out by the police or other law enforcement body.²¹ The ECJ also has jurisdiction to assess the legality of a framework decision in review proceedings: however, only the Commission and the Member States can bring such proceedings, to the exclusion not only of individuals, but also of the European Parliament.

And, as it has been noted before, the Union can also enter into international agreements in matters covered by Titles VI by using the competence provided for in Article 24 TEU as provided in Article 38 TEU.²² It should be noted, however, that in relation to co-operation in criminal matters there is no equivalent to the 'passarelle clause' provided in Articles 60 and 301 EC for the CFSP. Therefore, the use of third pillar competence cannot trigger, or be complemented by, Community action.

¹⁷ Cf CFI ruling in Case T-306/01 *Yusuf* [2005] ECR II-3533, now under appeal in Case C-415/05 P, case pending. See also Case T-315/01 *Kadi* [2005] II-3649, under appeal in Case C-402/05 P, case pending. The Community competence to enact freezing Regulations in respect of individuals and organisations not having a specific link to a third country is by no means uncontroversial; see e.g. E Spaventa 'Fundamental Rights and the Interface between Second and Third Pillar' in A Dashwood and M Maresceau ??? (forthcoming 2007); **EEckhout?**; in favour of such an interpretation see C Tomuschat 'Annotation of the *Yusuf* and *Kadi* judgments' in (2006) *CML Rev* 537.

¹⁸ Article 34 TEU.

¹⁹ See, by analogy, Case C-170/96, *Commission v Council* (Airport Transit Visas) [1998] ECR I-2763. It is likely that litigation as to the correct legal basis is on the increase; see e.g. Case C-176/03, *Commission v Council* [2005] ECR I-7879.

²⁰ Article 35 TEU. Before the Bulgarian and Romanian accession 14 out of 25 Member States had made such a declaration, see Information concerning the declarations by the French Republic and the Republic of Hungary on their acceptance of the jurisdiction of the Court of Justice to give preliminary rulings on the acts referred to in Article 35 of the Treaty on European Union [2005] OJ L 327/19.

²¹ Article 35(5) TEU.

²² E.g. *Agreement on Extradition between the European Union and the United States of America* [2003] OJ L 181/27; see also *Agreement on Mutual Legal Assistance between the European Union and the United States of America* [2003] OJ L 181/34; *Agreement between the European Union and the United States of America on the processing and transferring of passenger name record (PNR) data by air carriers to the United States* [2006] OJ L 298/29. For a rather critical appraisal of the agreement see the debate in front of the plenary session of the European Parliament, *Use of Passenger Data*, debate of 11/10/06, Document of 16/10/06, 13991/06 PE 326.

It is clear that the institutional framework provided for in relation to the CFSP, with its limitation of democratic accountability and the exclusion of any judicial protection, is inadequate to meet the basic demands of fundamental rights protection once action taken at Union level affects individuals. The same can be said in relation to international agreements adopted pursuant Articles 24 and 38 TEU, and in relation to mixed second and third pillar instruments, especially when the instrument is adopted through the use of a common position thus excluding any possibility of review by the European Court of Justice. We shall now turn to analyse the problems arising from the use of Union competence to identify individuals and organisations as ‘terrorists’.

II THE UN DERIVED TERRORIST LIST: FROM *YUSUF* TO *AYADI*

As mentioned above, terrorist lists have been adopted by the EU in two instruments: Common Position 2002/402, which implements the Anti-Taliban UN Security Council Resolution by imposing sanctions on those designated by the UN Sanctions Committee as being associated with the Taliban, Bin Laden, Al-Qaeda and the like.²³ And Common Position 2001/931, which contains a list of those identified by Council as being connected with terrorism. The format for both types of Acts is the same: the Union adopts a Common Position which is then given effect, as far as the freezing of assets is concerned, through a Community Regulation adopted on the basis of Articles 60, 301 and 308 EC.²⁴ However, in the case of the UN related list, the Common Position is taken on the basis of Article 15 TEU alone,²⁵ and the duty to update the list in the Regulation falls upon the Commission, which simply has regard to the UN list.

In the case of the ‘home-decided’ lists, the relevant instrument is Common Position 2001/931/CFSP which has been adopted using a mixed second and third pillar legal basis. As we shall see in more detail later, the mixity is due to the fact that Common Position 2001/931 identifies two categories of terrorists: those who have some link with outside the EU, and ‘home terrorists’, whose alleged terrorist activities are confined to within the EU boundaries. For this latter category of people, the Council and Commission found that there was no competence for enacting a freezing Regulation since there was not even a remote link to a third country which would justify the use of CFSP competence and of the *passerelle* clause contained in Articles 301 and 60 EC.²⁶ For this reason, this category of people and organisations are not subject to EU-wide freezing orders. The list in the

²³ UN Security Council Resolution 1390(2002).

²⁴ Council Regulation 88/2002 (the Anti-Taliban Regulation); and Council Regulation 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, (2001) OJ L 344/70.

²⁵ Common Position 2002/402/CFSP concerning restrictive measures against Usama bin Laden, members of the Al-Qaeda organization and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP, (2002) OJ L 169/4.

²⁶ It has been argued that the existence of the general anti-terrorist Resolution would have been enough to trigger CFSP competence; on the relationship between the UN anti-terrorist Resolution and Regulation 2580/2001 see several obiter in Case T-228/02 *Organisation des Modjahedines du peuple d’Iran (OMPI) v Council*, judgment of 12 December 2006, nyr.

Annex to the Common Position is updated regularly and, since in this case it is not a mere replication of the UN list, it falls upon the Council to do so voting unanimously.

The legality of both lists has been called into question; since the lists raise different legal problems we will first analyse the UN derived list, to then consider the EU list. As it has been mentioned above, the Anti-Taliban Common Position and Regulation are entirely of UN derivation and the Community institutions limit themselves to implement what decided at UN level. The list is drawn by a UN Sanctions Committee, and unanimity is required in order to both place on, and strike off, people and organizations the list. Those who have been included have no possibility to seek redress in front of the UN Sanctions Committee. Rather, the only avenue open to those affected is to persuade one of the Member States (either that of residence or that of nationality) to make representations in front of the UN Committee on their behalf; however, since unanimity is required to strike off people from the list, such remedy is not particularly effective. Furthermore, the UN Sanctions committee is a governmental not a judicial body. It is not surprising then that those included in the list might attempt to seek a judicial (and less partial) review of their case in front of a national court. In the Community context, since the UN list is implemented through a Regulation, the only competent courts to assess the validity of the Regulation are the European courts. One such challenge was brought in the *Yusuf* case.²⁷

Mr Yusuf had been placed on the list of those whose assets would be frozen following his inclusion in the UN Anti-Taliban list. He brought proceedings for annulment of Regulation 881/2002,²⁸ on the grounds, inter alia, of breach of fundamental rights. In particular, the applicant sought to challenge his inclusion in the Regulation by relying on the breach of the right to property and, more importantly, on the breach of his right to a fair hearing. In relation to the latter claim, Mr Yusuf stressed how he had not been told the reasons which led to the imposition of sanctions against him or the evidence which had been relied upon against him; nor had he been given the opportunity to explain himself. Given that both the adoption of Regulation 881/2002, and the inclusion of Mr Yusuf in the list annexed therein, were a direct consequence of the UN Anti-Taliban Resolution,²⁹ the Court of First Instance felt it necessary to start by assessing the extent of its own jurisdiction to review a Community instrument adopted in order to comply with UN obligations.

The Court found that there were ‘structural limits’ imposed to the review it could carry out in relation to the Regulation at issue. In particular, since the Council did not have any autonomous discretion, a review of the Regulation would imply a review of the UN Security Council Resolution, a power that the CFI felt it lacked, both as a matter of international law, and as a matter of Community law. However, the CFI accepted that it could scrutinise the Regulation, and indirectly the Security Council Resolution, in

²⁷ Cf CFI ruling in Case T-306/01 *Yusuf* [2005] ECR II-3533, now under appeal in Case C-405/05 P, case pending. See also Case T-315/01 *Kadi* [2005] ECR II- 3649, under appeal in Case C-402/05 P, case pending.

²⁸ The original claim related preceding Regulations and was later adjusted when the latter were repealed and substituted by Regulation 881/2002.

²⁹ UN Security Council Resolution 1390(2002).

relation to *jus cogens*, since such principles also bind the Security Council. As a result, the applicable standard of human rights protection is the lower *jus cogens* standard. In this respect, the Court found that the right to property had been adequately safeguarded since, following new Resolutions as implemented in Community law, the national authorities could (and can) declare that the freezing of funds does not apply to funds essential for ordinary expenses (food, medicines, rent etc). More importantly, however, the CFI found that the UN Sanctions Committee was under no duty to hear the applicant before his inclusion in the list, and that, in any event, the Security Council, by providing for the possibility for individuals to petition their State of nationality or of residence to make representations to the Sanctions Committee on their behalf, ‘intended to take into account, as far as possible,’ the fundamental rights of individuals. Short of errors in the identification of the persons concerned, that the CFI seems to be ready to scrutinise, there is thus no substantive review at Community level of the soundness of the reasons that led to inclusion in the UN list.

The *Yusuf* ruling has been criticised for several reasons: the CFI’s view of the relationship between UN Resolutions and Community law not only reflects an absolute monist understanding of the relationship between the two systems, but it also introduces something akin to direct effect of international norms within the Community and national legal system.³⁰ This debatable choice also redefines the effect of international law in domestic constitutional systems, rendering UN Resolutions directly effective, and unquestionable, in domestic systems through the medium of Community law.³¹ Furthermore, such pervasive effects in domestic constitutional law have been achieved by means of an extensive interpretation of Community competence. The result of the Court’s ruling in *Yusuf* is ultimately to leave a substantial gap in fundamental rights protection, by allowing representatives of the executive to impose sanctions on individuals without any guarantee as to how such individuals are chosen; and without there be any possibility of an independent (if not judicial) assessment of the, at least *prima facie*, evidence relied upon to justify such pervasive measures. Thus, the effect of the ruling is to deprive the claimant to any meaningful access to review of his/her inclusion in the UN list.

This said, the approach of the Court is more nuanced than what might appear at first sight. First, as we shall see below, it indicates the Court’s readiness to impose a more intensive scrutiny for EU produced lists; secondly, in *Yusuf*, the Court indicated in an obiter that it would be open to an applicant to bring judicial review proceedings, based either on domestic law or indirectly on Regulation 881/2002, of the national authorities’ refusal to make representations on behalf of the listed individual in front of the Sanctions Committee.³² In the subsequent case of *Ayadi*,³³ the CFI clarified that, as a matter of

³⁰ It is also a matter of debate whether the *Yusuf* understanding of the relationship between UN Resolutions and Community law is consistent with the ECJ decision in Case C-84/95 *Bosphorus* [1996] ECR I-3953, where the Court has no problem in scrutinizing a UN Security Council Resolution with the general principles of Community law; see also Case of *Bosphorus etc v. Ireland* (Appl. No. 45036/98), judgment of 30/6/05.

³¹ On those issues see also N Lavranos ‘Judicial Review of UN Sanctions by the Court of First Instance’ (2006) *European Foreign Affairs Review* 471.

³² Case T-306/01 *Yusuf* [2005] ECR II-3533, para 317.

³³ Case T-253/02 *Ayadi*, judgment of 12/07/06, nyr.

Community law, the Member States have an obligation to respect the claimant's fundamental rights when dealing with her/his application for review of their case with the aim of triggering the procedure for de-listing in front of the Sanctions Committee. The obligation to respect fundamental rights also applies in relation to all matters concerning the de-listing procedure (i.e. even in relation to the Member State's negotiations with other States); and judicial review of the Member State's refusal to consider the applicant's case must be ensured as a matter of Community law.

The reasoning of the CFI is persuasive: the UN Sanctions Committee has, in its guidelines, acknowledged that the Resolution in question confers a right on individuals to request a review of their case to their State for the purposes of being removed from the list. The Community Regulation giving effect to the UN Resolution then needs to be interpreted in conformity with the Committee's guidelines; however, since it is a Regulation that gives effect to the sanctions, such right should be seen as guaranteed not only by the Guidelines but also by the Community legal order itself. Thus, when the Member State examines the request for review, and when the Member State consults other States in the context of the procedure that might lead to de-listing, the Member State is bound by Article 6 TEU, and by fundamental rights as general principles of Community law. Respect for those obligations does not affect the Member State's performance of its UN obligations, and therefore the *Yusuf* reasoning does not apply to the de-listing procedure. Furthermore, the CFI also made clear that, insofar as that is allowed by the UN Resolution / Sanctions Committee, the national authorities must act proportionately in relation to the freezing order: thus, refusing a taxi driver's licence to the applicant without regard to 'his needs (...) and without consulting the Sanctions Committee' is a misrepresentation or misapplication of the Regulation concerned.³⁴

The effect of *Ayadi* is a welcomed qualification of the *Yusuf* ruling: whilst the CFI has confirmed the *Yusuf* interpretation in relation to the hierarchy between UN Resolutions and Community law, and whilst it has reaffirmed the exclusion of a possibility of review of inclusion in the list, it has imposed upon Member States a substantive Community law obligation to respect fundamental rights and the other general principles of Community law whenever dealing with those aspects of the Regulation about which the Member States (or indeed the Community) enjoy any discretion. Thus, even though the CFI does not impose an *automatic* duty upon Member States to make representations on behalf of individuals, it makes denial to do so much more difficult. In dealing with applications for review with the view of triggering the de-listing procedure, the national authorities have now, as a matter of Community law, several obligations, such as:

- (i) a duty to take into account the difficulties that individuals might face in protecting themselves, especially given that the person might not know why he/she has been put on the list; and might have no knowledge of the evidence relied upon against him/her. Thus, the fact that individuals might not be able to provide precise and relevant information to support their case should not be conclusive;

³⁴ On the duties falling upon national authorities see also Case T-47/03 R *Sison v Council* (Interim relief), Order [2003] ECR II-2047.

- (ii) a duty to act ‘promptly’ whenever re-examination seems to be justified; and
- (iii) the decision refusing to make representations on behalf of the individual must be reviewable as a matter of Community law, even when it would not be so in national law.

The *Ayadi* ruling is a clear attempt to afford the best protection possible, given the circumstances, to the individual. In this respect the principle of supremacy and direct effect of Community fundamental rights, together with ample discretion left to the national authorities to ensure as effective a protection as possible, narrows the gap in fundamental rights protection opened by the use of Community competence to implement UN individual sanctions. The irony now lies in the fact that those included in the EU list might well find themselves in a worse position than those included in the UN list.

III THE EU LISTS – THE IDENTIFICATION OF THE ‘TERRORISTS’

As we mentioned above, the Union has also drafted its ‘own’ list of terrorists in Common Position 2001/931/CFSP. The latter Common Position has been adopted in order to implement UN Security Council Resolution 1373(2001) on terrorism (the Anti-terrorist Resolution) which, *inter alia*, provides that States must freeze the assets of terrorist organisations and individuals; of entities controlled by terrorist organisations / individuals; of persons acting on behalf of terrorist organisations/individuals. The UN Security Council Resolution however fails to identify such entities, and it does not provide a list like the one adopted in relation to the Taliban Resolution. Furthermore, the Resolution fails to define what is meant by ‘terrorist’ act, offence etc, since agreement could not be reached on that point. Common Position 2001/931 on the other hand, gives a rather broad definition of terrorist act (which has been later duplicated in the Framework decision on terrorism),³⁵ and provides that the list of those identified as terrorist shall be drawn up on the ‘basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority’ in relation to those groups. The competent authority ‘shall mean a judicial authority, or, where judicial authorities have no competence (...) an equivalent competent authority in that area.’³⁶ The first issue for consideration relates then to how those who are included in the list are actually chosen.

First of all, it should be noted that Common Position 2001/931 does not give any indication as to what an ‘equivalent’ competent authority is: in this respect, Tappeiner has remarked how, despite what might appear at first sight, the relevant ‘authority’ might not only not be a judicial authority, but the criterion of ‘equivalence’ might be interpreted in a rather loose way to admit simple (unchecked) intelligence.³⁷

³⁵ Council Framework Decision on combating terrorism 2002/475/JHA, (2002) OJ L 164/3.

³⁶ Article 1(4) Common Position 2001/931/CFSP.

³⁷ I. Tappeiner ‘The fight against terrorism. The lists and the gaps’ (2005) 1 Utrecht Law Review, 97, and on line at www.utrechtlawreview.org. See also Case T-228/02 *Organisation des Modjahedines du peuple d’Iran (OMPI) v Council*, judgment of 12 December 2006, nyr, where Council and the United Kingdom

Secondly, it should be noted that the Common Position does not explicitly refer to the fact that the authority in question must be that of a Member State, thus leaving the avenue open for the possibility that the relevant decision might have been taken by an authority outside the European Union. And indeed, the fact that Article 1(4) Common Position 2001/931 refers to the possibility of including in the list those identified by the UN seems to support the view that the authority in question needs not be a domestic one. And at least in one case, it seems that the inclusion on the list of one of those individuals might have stemmed from political pressure exercised by a foreign country (whether this might in certain cases be the only criterion is impossible to say given the secrecy that surrounds the entire exercise).³⁸ The fact that a decision of a non-EU country might be given such pan-European effects is clearly problematic: the fundamental rights standard of the country in question might fall short of those (which should be) applied by the Union; and, there is an increased danger that inclusion on the list might be the result of a foreign policy decision rather than the result of an independent assessment as to whether the individual and/or the organisation in question is actually connected to terrorism.

Thirdly, it is impossible to say whether Council exercises any control over the names suggested by Member States. Whilst inclusion in the list needs to be unanimously agreed by Council, there is the possibility that Council does not in fact exercise a real scrutiny over the names suggested by the Member States, and that it merely rubber-stamps the decision of other Member States. And, a recent decision of the Court of First Instance, seems to have legitimised a ‘rubber-stamping’ approach. In the *OMPI* case, in relation to the list contained in Regulation 2580/2001, the Court held that Council has no other duty than to assess whether there exists a decision by a competent authority, excluding Council’s duty not only to assess whether the national procedure was conducted correctly, but even ‘whether the fundamental rights of the party concerned were respected by the national authorities’.³⁹ In this way, the CFI has accepted that a national decision, even when not judicial, can be given pan-European effects regardless of whether the minimum guarantees of fundamental rights protection required by Article 6 TEU and by the general principles of Union law have been respected. This is all the more worrying given that, as said above, there is no guarantee that the decision at stake would have been adopted by a European Union authority.⁴⁰

refused to (or could not) identify the authority the decision of which led to the inclusion of the applicant in the list.

³⁸ See the transcript of comments on combating the financing of terrorism made by Alan P. Larson, Under Secretary for Economic, Business, and Agricultural Affairs, in testimony before the House (Congress) Committee on Financial Services on 19 September 2002, http://useu.usmission.gov/Dossiers/Terrorist_Financing/Sep1902_Larson_Testimony.asp; ‘The European Union has worked with us to ensure that nearly every terrorist individual and entity designated by the United States has also been designated by the European Union’, and also the testimony of Juan C. Zarate (Deputy Assistant Secretary, Executive Office) *Terrorist financing and financial crime*, US Department of the Treasury, Senate Foreign Relations Committee, 18 March 2003, JS-139 (<http://www.ustreas.gov/press/releases/js139.htm>).

³⁹ Case T-228/02 *Organisation des Modjahedines du peuple d’Iran (OMPI) v Council*, judgment of 12 December 2006, nyr, para 121.

⁴⁰ And, following the recent reports on the Member States’ complacency in relation to ‘extraordinary renditions’, and given that the equivalent authority needs not to be a judicial one, it is hardly for the Union

Furthermore, given the possibility of lack of scrutiny by Council, there is a real risk that inclusion in the list might be politically motivated. In this respect, the Amnesty International report on counter-terrorism and EU criminal law refers to the case of *Segi*. As we shall see in more detail in below, SEGI, an organisation supporting Basque independence, has been included in the list of ‘home-terrorists’. This notwithstanding the French *Cour de Cassation* upheld the French Court of Appeal’s decision not to surrender to the Spanish authorities the spokesperson for SEGI on the grounds that part of the alleged offence had been carried out in France. However, the French authorities have never taken any action to prosecute the alleged offences.⁴¹ This reinforces the suspicion that the list might serve to introduce a pan-European proscription of organisations even when inclusion might be, if not altogether politically motivated, at least deeply rooted in the political problems/conflict/reality of one single Member State.

Fourthly, it should be noted that the entire listing process is, not surprisingly, surrounded by secrecy. Thus, it is very difficult for an individual to obtain any meaningful information as to why his/her name has been included in the list. In the case of *Sison*,⁴² one such people, requested access to the documents which had led the Council to include his name in the list by relying on Regulation 1049/2001 on public access to documents.⁴³ The Council refused even partial access to those documents relying on the fact that disclosure would undermine public security and international relations; and it also refused to disclose the identity of the States that had provided the information on the grounds that the originating authority opposed disclosure. Both the CFI and the ECJ have upheld the Council’s decision, thus excluding that Regulation 1049/2001 can ever apply to the information relating to inclusion in the list. The ruling might well be justified having regard to the public security exception since, were the principle of open access apply to such documents, it would most likely have to apply *erga omnes*, i.e. so that anyone could access such documents, something that might undoubtedly contrast with the public interest of both the Union and the Member State which instigated the listing. This said, in the above mentioned *OMPI* case,⁴⁴ the Court of First Instance has held that the duty to state reasons and the right to a fair hearing apply, at least to a certain extent, to the

and its Member States to claim the moral high-ground on such matters. See European Parliament Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200); Report *CIA Activities in Europe*, 14 February 2007; Council of Europe, *Committee on Legal Affairs and Human Rights, Alleged secret detentions and unlawful inter-state transfers involving Council of Europe Member States*, available on statewatch.org.

⁴¹ Amnesty International Report (EU Office) *Human Rights dissolving at the borders? Counter-terrorism and EU criminal law*, 31/5/05, AI Index: IOR 61/013/2005, also available on <http://web.amnesty.org/library/index/engior610132005>, page 15. For the text of the decision see Council documents, *Comments of the French delegation, presenting the main decisions handed down by the Supreme Court of Appeal on the European Arrest Warrant*, 2/09/05, doc. No. 11902/05, COPEN 133, EJN 52, EUROJUST 56.

⁴² Joined Cases T-110/03, T-150/03 and T-405/03 *Sison v Council* [2005] ECR II-1429, upheld in Case C-266/05 P *Sison v Council*, judgment of 1 February 2007, nyr.

⁴³ Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145/43.

⁴⁴ Case T-228/02 *Organisation des Modjahedines du peuple d’Iran (OMPI) v Council*, judgment of 12 December 2006, nyr.

Council's decision to include someone on the list. Following the decision, Council has indicated that it will provide those listed with such reasons;⁴⁵ it remains to be seen however, whether Council will be willing to go much beyond a formal compliance with such duty. Given that the inclusion in the list is at the request of the Member States, there is a non-insignificant risk that the statement of reasons might, at best, simply identify the national authority's decision (when indeed there is one) which has triggered the listing.

Lastly, it should be noted that in the context of the EU list, there is no procedure in place to request a Member State to review one's case and make representations to the Council with a view to de-listing. This means that the only avenue open to a listed individual/organisation is a legal challenge to the legality of the inclusion of his/her name in the list. We will consider the problems arising in relation to such challenge in the next section. However, in the meanwhile, it should be noted how, in any event, 'home-terrorists' are deprived of any access to judicial review at European level, since the European Courts do not have jurisdiction over Common Positions. The lack of a de-listing procedure then leaves such applicants without even those minimal remedies afforded to those who are included in the UN list. We will deal with this issue further down below.

IV THE EU FOREIGN TERRORISTS LIST AND JUDICIAL REVIEW: SOME STRUCTURAL DIFFICULTIES

As said above, Common Position 2001/931/CFSP provides for two types of 'terrorists', those with a connection to third countries, and entirely EU based terrorists. It is only in relation to the former that freezing measures can be taken at Community level since the list of home terrorists is adopted using Title VI competence and therefore cannot benefit of the *passerelle* clause contained in Articles 60 and 301 EC.

Regulation 2580/2001 implements Common Position 2001/931/CFSP and provides for the freezing of assets of those listed in the Common Position as regularly amended by the Council. According to Article 1(6) of Common Position 2001/931, the list must be updated by means of a Common Position at least every six months;⁴⁶ such article applies also to the Regulation and in relation to that instrument the list is updated by means of a Council decision. The reason for the duplication is that the latter instrument is that applicable in relation to the Regulation, whilst the former, which contains both home and foreign terrorists, is the general CFSP one (which consequently cannot have direct effect).

The Council Decision which lists the individuals subject to the freezing of assets provided for by the Regulation is naturally of direct and individual concern to those who

⁴⁵ See Notice for the attention of those persons/groups/entities that have been included by Council Decision 2006/1008/EC of 21 December on the list of persons, groups and entities to which Regulation 2580/2001 applies, (2006) C 320/02.

⁴⁶ This time limit is currently being ignored by the Council; the last amendment was over 9 months ago, on 29 May 2006, Common Position 2006/380/CFSP and Council Decision 2006/379/EC.

are identified in the Decision and therefore can be reviewed under Article 230 EC.⁴⁷ There is no doubt that cases concerning inclusion in the list could also be referred by national courts on a preliminary ruling. In any case, however, since we are within the ambit of Community law, the *Foto-Frost* principle should apply and the only courts to have jurisdiction to declare the nullity of the applicant's inclusion in the list are the Community courts.⁴⁸ This might create significant problems, given that it is not obvious that the Rules of Procedure are suitable for accommodating such complex proceedings where sensitive evidence might have to be discussed.⁴⁹ Furthermore, the duty to justify inclusion on the list would fall upon Council; however, the intelligence upon which inclusion in the list is based is national (if not altogether external to the EU) and not all of it might have been disclosed to Council for inclusion in the relevant file. This might lead to some difficulties since, presumably, and unless the relevant Member State is prepared to grant access to fuller intelligence, the case might fall to be decided, if at all, on the incomplete evidence contained in the file. The situation is even worse should the case reach the Court through means of a preliminary ruling since those proceedings are not adversarial in nature and, in relation to those proceedings, the right of the defence might well be compromised.⁵⁰

But even leaving aside the procedural difficulties in having the Community courts dealing with those cases, the real issue relates to the extent to which those courts are willing to conduct a substantive review of the Council decision to include someone on the list. A recent case might serve to illustrate the problem inherent in entrusting the Community courts with judicial review in such matters. In the above mentioned *OMPI* ruling,⁵¹ one of the organisations which had been listed in both the Common Position and in the Community list, and whose assets had consequently been frozen, brought an action for annulment in front of the CFI. The *OMPI* relied, inter alia, on infringement of a right to a fair hearing; infringement of the duty to state reasons; and on the infringement of the right to effective judicial protection. The Council had failed to hear the applicant either before or after its inclusion in the list; and it had refused to communicate the reasons which led to the decision to include it in the list, and the authority which had instigated such inclusion.

⁴⁷ Case T-229/02 *Kurdistan Workers' Party (PKK) and Kurdistan National Congress (KKK)*, Order [2005] ECR I-539, para 27. In this case the CFI nonetheless found that the applicant, a Mr Ocalan who claimed to act on behalf of the PKK, did not have standing since he could not claim to be the legal representative of an organisation which had ceased to exist. The flaws in the CFI's argument have been fully exposed by AG Kokott in her Opinion on the appeal to the CFI ruling, Case C-229/05 P *Kurdistan Workers' Party (PKK) and Kurdistan National Congress (KKK)*, Opinion of 27/09/2006; the Court has agreed with the AG and has quashed the CFI ruling, judgment of 18 January 2007, nyr.

⁴⁸ Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

⁴⁹ Cf also obiter at para 158 of Case T-228/02 *Organisation des Modjahedines du peuple d'Iran (OMPI) v Council*, judgment of 12 December 2006, nyr.

⁵⁰ The situation would be incredibly difficult also given that Council would not be formally part of the proceedings even though it would of course be open to it to intervene.

⁵¹ Case T-228/02 *Organisation des Modjahedines du peuple d'Iran (OMPI) v Council*, judgment of 12 December 2006, nyr.

The Court found that the right to a fair hearing, the duty to state reason and the right to effective judicial protection all applied to the contested decision; however, it refused to engage in the substantive review of the reasons which led to the applicant's inclusion in the list. Thus, it held that the right to be heard is limited to the opportunity for applicants to make known their views as to 'the legal conditions of application of the Community measure in question', i.e. as to whether there is specific information or material in the file which shows that a decision meeting the definition in Article 1(4) of Common Position 2001/931 has been taken by a competent national authority, and in the case in which the case concerns the decision to maintain someone on the list, whether there is a justification for so doing. The Court also clarified that issues relating to the well-foundedness and appropriateness of the decision to include someone in the list can 'only be raised at national level'. And as mentioned before, the Court indicated that Council bears no duty to investigate whether the national authority's decision was adopted in proceedings conducted correctly or whether the fundamental rights of the parties concerned were respected by such authority. In its abdication of judicial responsibility, the Court went even further stating that even though one of the conditions for the legality of inclusion in the list is that the decision must have been based 'on serious and credible evidence', those affected by such decisions do not have a right to be heard in respect of such matters. Thus, in the Court's view, 'it would be *inappropriate*, in the light of the principle of sincere cooperation referred to in Article 10 EC, to make it subject to the exercise of a fair hearing at Community level'.⁵² The only exception to this principle arises when the Council based its decision to 'freeze funds on information or evidence communicated to it by representatives of the Member States without it having been assessed by the competent national authority'. Whilst this qualification might at first sight look reassuring, since it might introduce a right to be heard in relation to the substance of the allegations, at closer scrutiny it constitutes a worrying indication that the Court might be willing to extend Council's power beyond the, very limited, procedural requirements provided for in Article 1(4) Common Position 2001/931. That provision states that 'The list in the Annex shall be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority (...)'. Article 1(4) is phrased in mandatory terms and does not seem to confer upon Council the power to include someone in the list *regardless* of a prior national authority's decision. Yet, the Court seems to indicate that that would be possible.

In the *OMPI* case, the CFI also recognised that, after the first order for the freezing of funds has taken place, those concerned have a right to be notified of the evidence adduced against them and a right to request a re-examination of the initial decision. However, the Court again qualified such right by stating that a hearing in such circumstances is not 'automatically required' since those concerned have in any event the right to bring judicial proceedings for annulment in front of the Community courts. The Council has also an obligation to state reasons which in these cases entail an obligation 'to state the matters of fact and law which constitute the legal basis of [the Council's]

⁵² Case T-228/02 *Organisation des Modjahedines du peuple d'Iran (OMPI) v Council*, judgment of 12 December 2006, nyr, para 122, emphasis added.

decision and the considerations which led it to adopt that decision'.⁵³ In any event, however, those rights are subject to the public security/interest caveat so that Council is entitled to refuse disclosure of evidence and of information contained in the file to protect such interests. As to the extent to which 'effective judicial protection' is guaranteed by the Court, the ruling contains contradictory statements. Thus the Court first stated that the Community courts must be able to review both the lawfulness and the *merits* of the decision to freeze funds, without Council being entitled to refuse disclosure of the evidence, to then conclude that since it is not for the judiciary to substitute its assessment for that of the Council, the Court's review must be restricted to 'checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of powers'.⁵⁴

The *OMPI* case seems to indicate the Court's unwillingness to engage with the substantive issues which determined inclusion in the list, preferring it to leave such issues to the competent national authority, thus ensuring that such decisions can be given pan-European effect without the need for further scrutiny.⁵⁵ Furthermore, it should be remembered that there is no guarantee that the decision would have been taken by a judicial authority (something which admittedly would make things less bleak from a fundamental rights perspective); that neither Common Position 2001/931 or the Court have defined what is to be intended for authority 'equivalent' to a judicial one; and that the Court indicates that such a decision does not in any event represent an essential procedural or substantive requirement for the legality of inclusion. This surrender of jurisdiction is legally questionable: once an individual or an organization has been placed on the EU list, then the matter becomes one governed by European Union law, and therefore subject to the conditions of legality imposed by such system including fundamental rights protection. The Court's deference to national process is therefore puzzling: the standards upon which Union action must be assessed is that set by European Union law, not that set by national law. Moreover, the Court's indication that not even Council should perform any substantive scrutiny seems to be inconsistent with Council's duties as provided by Article 6 TEU.

The other thorny issue relating to the list concerns whether the freezing of assets is properly defined as a criminal charge which should trigger the guarantees provided in Article 6 ECHR. The issue was argued in the *Sison* access to documents case,⁵⁶ but the CFI decided that it was not relevant for that case, rather being an issue for consideration

⁵³ Case T-228/02 *Organisation des Modjahedines du peuple d'Iran (OMPI) v Council*, judgment of 12 December 2006, nyr, para 143.

⁵⁴ Case T-228/02 *Organisation des Modjahedines du peuple d'Iran (OMPI) v Council*, judgment of 12 December 2006, nyr, paras 155 and 159 respectively.

⁵⁵ It could also be queried whether the *OMPI* ruling is consistent with the ruling in *Ayadi*, where, as we have seen above, the Court relied on the discretion conferred upon the Community legislature and upon national authorities to impose substantive duties upon the national authorities. It is puzzling then that the Community institutions should be subject to (arguably) lower standards than those imposed upon national authorities.

⁵⁶ Joined Cases T-110/03, T-150/03 and T-405/03 *Sison v Council* [2005] ECR II-1429.

in the related case for annulment, which is still pending.⁵⁷ In the *OMPI* the Court did not analyse the issue, even though given the low standard of review imposed on the Council's decision, one might infer that the Court does not believe that such guarantees are necessary in relation to such cases

Finally, it should be noted that Council seems not to be willing to respect the Court's authority. In the *OMPI* case, the CFI annulled the inclusion of the applicant in the list; this notwithstanding the Council has failed to give effect to the ruling and the *OMPI*'s assets are still frozen. This is the case, even though, subsequently to the ruling, Council adopted a new Common Position and a new decision in order to add more individuals and organizations to its lists.⁵⁸ Furthermore, Council has also indicated that it does not believe that the ruling affects the list annexed to the Common Position, since the CFI did not annul the inclusion of the applicant in that list.⁵⁹ The reason why the CFI did not do so is of course because it did not have jurisdiction to review the Common Position. Given that Council is bound by fundamental rights regardless of whether it acts as a Community or a Union institution, and given that the CFI found that the applicant's fundamental rights had been infringed, Council's position is not only untenable but in blatant defiance of the rule of law.

V. HOME MADE TERRORISTS AND EFFECTIVE JUDICIAL PROTECTION

It is now time to consider the EU list of 'home-terrorists', i.e. those whose assets cannot be frozen.⁶⁰ This area does not squarely fall within the scope of this contribution since it is only remotely connected to foreign policy. Yet, in order to give a more complete picture of the status of fundamental rights protection in the Union, it might be useful to make some remarks. This part of the list, like the foreign terrorist list, was adopted to give effect to the general anti-terrorism Resolution which, as mentioned before, requires States to take action (including the freezing of funds) against those identified as terrorists

⁵⁷ Case T-47/03 *Sison v Council*, case pending.

⁵⁸ Council Decision 2006/1008 of implementing Article 2(3) of Regulation 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (2006) OJ L 379/123. It should also be noted that at the time of writing the Council has failed to update the existing list, even though more than 9 months have elapsed since the last update, thus also infringing Article 1(6) of Common Position 2001/931 which provides in mandatory terms the duty to review the list at least every six months. In the writer's opinion such infringement constitutes infringement of an essential procedural (and substantive) requirement which should render the entire list void. On these issues see E. Spaventa 'Fundamental Rights and the Interface between the Second and Third Pillar' in A. Dashwood and M. Maresceau (eds), forthcoming 2007.

⁵⁹ EU Council Secretariat Factsheet *Judgment of the Court of First Instance in the OMPI case T-228/02*, para 3. The only concession the Council has made to the ruling is to undertake to provide statement of reasons for those whose assets have been frozen and to establish a clearer and more transparent procedure for reconsideration. See also Notice for the attention of those persons/groups/entities that have been included by Council Decision 2006/1008/EC of 21 December on the list of persons, groups and entities to which Regulation 2580/2001 applies, (2006) C 320/02.

⁶⁰ The remarks in this section apply of course also to the 'foreign' terrorists insofar as they are listed in the Common Position. However, and as seen above, those have access to the court because of the freezing Regulation. Following the remarks of the Council to the effect that annulment of the decision to include someone in the Regulation does not affect their inclusion in the list annexed to the Common Position, it cannot be excluded that even foreign terrorists might find themselves in this legal limbo.

or involved in supporting terrorism. Despite the clear UN mandate, the European Union institutions have limited themselves to a mere identification of those who should be considered as terrorist, without requiring the Member States to take any further action. Thus, the domestic part of the list has been adopted by means of a Title VI Common Position, an instrument which simply sets policy objectives for the Union and it is not explicitly binding upon Member States (albeit the duty of loyal co-operation would apply). Furthermore, the Common Position demands no specific action from the Member States which are just required to ‘fully exploit their powers’ in relation to requests from other Member States authorities.

The choice of a Common Position is therefore puzzling: on the one hand, it seems to put the Union in a questionable position from an international law viewpoint, since if those identified in the list are indeed terrorists, the Union and its Member States have an international law obligation to take action. And yet, the Common Position does not require Member States to freeze the assets of those therein identified therefore raising suspicions as to whether inclusion in the EU domestic list might not be politically motivated.

On the other hand, the fact that the list has been adopted in a Common Position might give rise to the suspicion that such choice might have been instrumental to the desire to evade any judicial (and democratic) accountability since, as said above, common positions are not subject to the jurisdiction of the ECJ. This leads to the very concrete possibility that a person listed as ‘home-terrorist’ might find him/herself in a limbo where access to any judicial review is prevented. This issue has been raised in front of both the European Court of Human Rights and the Community courts by SEGI, an organization supporting Basque independence and included in the list of home terrorists. In front of the European Court of Human Rights, SEGI complained of breach of several Convention rights, including the presumption of innocence, freedom of expression and freedom of association. The European Court of Human Rights refused to hear the case on the grounds that there had been only a *potential* rather than actual breach of the Convention.⁶¹ SEGI then brought an action for damages in front of the CFI, which dismissed the case since it has no jurisdiction to review Common Positions. As a result, and as acknowledged by the CFI itself, the claimant was left without any judicial remedy.⁶²

As far as de-listing is concerned, two solutions might be considered. First, one should consider the possibility for a national court to grant an injunction against the State requiring it to make representations in Council on behalf of the applicant, regardless of whether such possibility is provided for in the Common Position. Furthermore, it could be argued that even where such possibility is not provided by national law, the national

⁶¹ Decision declaring the inadmissibility of the case *Segi and Gestoras pro-Amnistía v. 15 States of the European Union*, appl. no 6422/02, and 9916/02, 23 May 2002. The ECtHR decision seems also to have been driven by the mistaken certainty that in any case the Community courts would have jurisdiction.

⁶² Case T-338/02, *Segi et al v. Council*, order of 7/06/04, para 39; upheld in Case C-355/04 P *Segi et al Council*, judgment of 27 February 2007. See also the interesting opinion of AG Mengozzi, delivered on 26 October 2006.

court might still, applying by analogy the principles elaborated in the context of the first pillar, and especially those elaborated in *Ayadi*, be under a Union law obligation to create a remedy to ensure that the principle of effective judicial protection is complied with. Secondly, in relation to national courts in those Member States which have accepted the jurisdiction of the Court pursuant to Article 35 TEU, the possibility should be considered that it would be open to the national court to assess whether the Common Position is not in fact a decision. According to Article 34 TEU a common position defines the ‘approach’ of the Union to a particular matter. An instrument which identifies named individuals and requires Member States to engage in third pillar co-operation in relation to those individuals, is not merely defining the approach of the Union. Whilst it could be that the choice of instrument was dictated by the desire to save both words and legal instruments, it could be said that the list concerning home-terrorists is in fact a decision. Since the definition that the institutions give to an act is not conclusive, the national court could depart from it and make a preliminary reference to the ECJ to assess both whether the common position is in fact a decision and, should that be the case, whether inclusion of the applicant in the list is justified. This finding seems to find support in the European Court of Justice’s ruling in the appeal to the *SEGI* case.⁶³ There, the Court held that the Court’s jurisdiction under Article 35 TEU, according to which framework decisions and decisions might be the subject of a preliminary ruling, is intended to ensure jurisdiction in relation to those acts which might produce legal effects in relation to third parties. A Common Position producing such effects might have a scope going beyond what provided for in Article 34 TEU, and the national court should feel empowered to make a preliminary reference to enquire if such is actually the case. Whilst the ECJ ruling is to be welcomed, it is also going to raise considerable issues of interpretation because of the reference to the need for the Common Position to produce legal effects vis-à-vis third parties. It is not clear that a Common Position might in itself produce such effects: whilst the prejudice to those therein listed is clear, there is no ‘legal’ consequence, strictly speaking, following from inclusion in such list. It would have therefore been better if the Court had simply focused on the nature of the act, regardless of the ‘legal’ effects to third parties.

Conclusions

In this contribution I have tried to voice some concerns over the increasing use of Union competence in fields which affect individual rights. This is particularly worrying in those cases where judicial scrutiny is more limited. In this respect, I would argue that the failure in the Union institutional structure to provide for effective judicial (and democratic) accountability might push the standard of fundamental rights protection below the minimum guarantees provided by the ECHR. Truth be told, the same could be said with many of the developments that have occurred as a result of the ‘war on terror’. Whilst the UN smart sanctions might have been a reasonable response to the need to isolate ‘nasty’ regimes, the practice of identifying individuals as ‘terrorists’ without having put into place any system aimed at counterchecking a decision which is, at the end of the day, exclusively executive based is extremely worrying. The CFI ruling in *Yusuf*, even when tamed by the ruling in *Ayadi*, constitutes an uncritical, and therefore

⁶³ Case C-355/04 P *SEGI at al. v Council*, judgment of 27 February 2007, nyr.

dangerous, reception of the status quo. The same can be said about the ruling in the *OMPI* case. The latter, despite appearances, falls short of even those minimum guarantees established in *Ayadi*.

The abdication of judicial responsibility in this field is particularly worrying, not least since the very definition of what, and who, constitutes a terrorist is politically motivated. And it is in the realm of politics, not of law, that any a priori definition should apply. The debate as to whether we should entertain relations with a Hamas-led government in Palestine, with the PKK, or even with the IRA or ETA, is a political debate. But the realm of the law is different: by definition, we are not concerned with a priori assessments. We are concerned only with whether a crime, even a broadly defined one, has been committed. If so, prosecution should ensue regardless of any political assessment and with all the guarantees afforded to the defendant. But, other than that, we should resist any temptation to justify the sacrifice of our fundamental rights on the altar of that undefined god who is fighting the 'war on terror' on our behalf. This said, it seems that the Member States are taking a rather different view on the matter; the guarantees which we once knew as standard are not so any longer. There is no democratic nor clear judicial accountability for those decisions. Rather, international and inter-governmental action is being used as a shelter. It is for this reason that judicial activism is needed. But we should be conscious of the fact that judicial activism is only a palliative treatment for such an acute endemic disease in the European Union. The only appropriate treatment lies with a Treaty amendment, as it would have been provided by the Constitutional Treaty. Lacking such a step, the Member States should refrain (and can indeed refrain) from acting at Union level in matters that affect individual rights.